# INDEX


| | Page |
|---|---|
| **OPINIONS BELOW** | 1 |
| **JURISDICTION** | 2 |
| **STATUTES INVOLVED** | 2, 63a |
| **QUESTIONS PRESENTED** | 2 |
| **STATEMENT** | 3 |
| **THE QUESTIONS ARE SUBSTANTIAL** | 7 |
| **CONCLUSION** | 15 |
| **APPENDIX A—District Court Opinion (185 F. Supp. 838)** | 1a |
| **APPENDIX B—District Court Judgment** | 26a |
| **APPENDIX C—Division 1 Report (74 M.C.C. 324)** | 27a |
| **APPENDIX D—Commission Report on Reconsideration (79 M.C.C. 695)** | 34a |
| **APPENDIX E—Statutes Involved** | 63a |


## CASES CITED


| | |
|---|---|
| *American Trucking Ass'ns, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133 | 2 |
| *American Trucking Ass'ns, Inc., et al.* v. *United States et al* 364 U.S. 1 | 2, 14 |
| *Reddish* v. *United States*, U.S.D.C., W.D. Ark., CA 1531, decided Oct. 19, 1960 | 15 |
| *United States* v. *Contract Steel Carriers*, 350 U.S. 409 | 7, 11 |


## STATUTES CITED


| | |
|---|---|
| Interstate Commerce Act, 24 Stat. 379, as amended, 49 U.S.C. 1 et seq: | |
| National Transportation Policy, 49 U.S.C. preceding § 1 | 3, 8, 9, 12, 13, 63a |
| Section 203(a) (15), 49 U.S.C. 303(a)(15) | 2, 7, 8, 63a |
| Section 209(b), 49 U.S.C. 309(b) | 2, 3, 4, 7, 8, 10, 11, 12, 13, 64a |
| 28 U.S.C. 1336, 1398, 2284 and 2321–2325 | 2 |
| 28 U.S.C. 1253 and 2101(b) | 2 |


## MISCELLANEOUS


| | |
|---|---|
| Senate Rep. 703, 85th Cong., 1st Sess | 14 |
| Surface Transportation—Scope of Authority of I.C.C.—1957 Senate Hearings, 85th Cong., 1st Sess | 12, 13, 14 |

# In the Supreme Court of the United States

OCTOBER TERM, 1960

No. ——

INTERSTATE COMMERCE COMMISSION, APPELLANT

*v.*

J–T TRANSPORT COMPANY, INC., ET AL., APPELLEES

*ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI—WESTERN DIVISION*

## JURISDICTIONAL STATEMENT

## OPINIONS BELOW

The opinion of the United States District Court for the Western District of Missouri has been reported at 185 F. Supp. 838, and it is set forth in Appendix A to this Statement. The reports of the Interstate Commerce Commission are printed at 74 M.C.C. 324 (Report of Division 1) and 79 M.C.C. 695 (Report of the entire Commission).[1] They are repro-

[1] These reports both involved two motor carrier application proceedings before the Commission, namely, Docket No. MC–11185 (Sub-No. 100), entitled *J–T Transport Co., Inc., Extension—Columbus, Ohio*, and Docket No. MC–11185 (Sub-No. 102), entitled *J–T Transport Co., Inc., Extension—Indianapolis, Ind.* The Commission's orders in only the second, or the Sub 102 docket, are involved in the instant court proceedings.

duced as Appendices C and D, respectively, to this Statement.

## JURISDICTION

The action was brought under 28 U.S.C. 1336, 1398, 2284, and 2321 to 2325, inclusive, to set aside orders of the Interstate Commerce Commission. The judgment of the District Court (attached as Appendix B) was entered on August 9, 1960, and notice of appeal was filed in that court by the Commission on October 6, 1960.

The jurisdiction of this Court to review the decision of the District Court on direct appeal is conferred by 28 U.S.C. 1253 and 2101(b), and is sustained by the following decisions: *American Trucking Associations, Inc., et al.* v. *Frisco Transportation Co.*, 358 U.S. 133, and *American Trucking Associations, Inc., et al.* v. *United States et al.*, 364 U.S. 1.

## STATUTES INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in Appendix E.

## QUESTIONS PRESENTED

1. Whether the District Court erred in holding that by the 1957 amendments to Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15) and 309(b), Congress intended to require the Interstate Commerce Commission to grant a motor contract carrier permit without regard to the fact that existing motor common carriers are able and willing to provide adequate service to the shipper.

2. Whether the District Court erred in holding that Section 209(b) of the Interstate Commerce Act,

which requires the Commission to consider "the effect which granting the [contract carrier] permit would have upon the services of the protesting carriers," refers only to the diversion of traffic from a protesting carrier who is actually serving the shipper, and does not permit consideration of the loss of potential traffic by a protesting carrier who is able and willing to serve the shipper.

3. Whether the District Court erroneously concluded that the Interstate Commerce Commission, in denying an application for a motor contract carrier permit, had placed upon the applicant the burden of proving that the services of existing carriers are inadequate.

4. Whether the District Court erred in holding that the 1957 amendments to Section 209(b) made exclusive the five factors which the Commission was directed to consider, and precluded its consideration of other factors, in determining whether a grant of a contract carrier permit would be consistent with the public interest and the national transportation policy.

## STATEMENT

Prior to the Commission hearing held in this case on May 22, 1957, there had been issued to the appellee J-T Transport Company, Inc., of Kansas City, Missouri, sixteen different permits [2] as a contract carrier

[2] Issued over the period from July 6, 1953, to January 17, 1957, in J-T's Dockets Nos. MC-11185, Sub-Nos. 37, 61, 64, 69, 72, 73, 76, 79, 80, 82, 84, 85, 91, 92, and 94 (Applicant's Exhibit No. 1 to the transcript of testimony, being part of Plaintiffs' Exhibit "A" received in evidence at the hearing on February 15, 1960, before the court below).

by motor vehicle under Section 209(b) of the Interstate Commerce Act, authorizing transportation by it of commodities described generally as uncrated aircraft components and assemblies, utilized by J–T for nine aircraft manufacturers, between various points in the United States, principally between certain points in Midwestern and Western States. By application filed on March 14, 1957, in J–T's Docket No. MC–11185 (Sub-No. 102), as amended on April 12, 1958, an extension-of-service permit was sought for operation as a contract carrier of "aircraft landing-gear bulkheads, uncrated, requiring special handling and special equipment because of their fragile nature," over irregular routes from Indianapolis, Ind., to Wichita, Kansas.

At the hearing held on this application, the Wichita Division of Boeing Airplane Company, consignee of the proposed traffic, supported the grant of the proposed permit. A manufacturer at Indianapolis, H & B American Machine Company, makes landing-gear bulkheads of outsize dimensions for Boeing, which the latter installs, upon delivery to it, in B–52 airplanes being manufactured at Wichita for the United States Air Force. Until the grant of temporary authority on February 8, 1957, to J–T, these bulkheads had been transported for about 20 months prior to that date from Indianapolis to Wichita by rail carriers, in returnable crates in flat cars.

U.S.A.C. Transport, Inc., of Detroit, Mich., one of the protestants against the grant of the application,

and which has also filed notice of appeal from the decision of the court below, is a motor common carrier which has held a certificate of public convenience and necessity from the Commission since January 18, 1950, in its Docket No. MC–108068 (Sub-No. 12) to transport, inter alia, "aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight, or fragile nature," over irregular routes between points in the United States lying east of the Mississippi River and points lying west of that River, which authority would embrace the transportation from Indianapolis to Wichita proposed by appellee J–T. This protestant has served the aircraft industry almost exclusively since its predecessor-in-interest, U.S. Aeroplane Carriers, Inc., first obtained a certificate from the Commission in 1941. Among its 18 terminals throughout the country, U.S.A.C. maintains one at Indianapolis, the origin point of the shipments of bulkheads, where its equipment have not been fully utilized. It has in the past modified its equipment and has tailored its service to meet the specific transportation requirements of aircraft manufacturers, and it would meet Boeing's requirements, if it were offered the Indianapolis-Wichita traffic. Although Boeing knew of and had previously used the authorized common carrier services of U.S.A.C., it did not request that carrier to supply equipment for the Indianapolis-to-Wichita movement. U.S.A.C. brought these facts out upon the record at the Commission's hearing.

The hearing examiner on July 16, 1957, recommended a grant of J–T's Sub 102 application (Complaint, Appendix "A", page 3). Following exceptions filed to that recommended report, and a reply, the Commission's Division 1, on January 31, 1958, issued its report (74 M.C.C. 324, being Appendix C, *infra*, pp. 27a–33a) and order disapproving the examiner's recommendations and denying the Sub 102 application.[3] Reconsideration and oral argument were denied by order of July 25, 1958, by the entire Commission (Complaint, Appendix "C"). Upon J–T's second petition for reconsideration filed on September 2, 1958, the entire Commission by order of October 16, 1958 (Complaint, Appendix "E") reopened the Sub 102 proceeding for reconsideration and for the issuance of a further report and order of the Commission.

On June 15, 1959, the Commission issued its report on reconsideration (79 M.C.C. 695, being Appendix D, *infra*, pp. 34a–62a) and order,[4] again denying the Sub 102 application.

On August 21, 1959, J-T instituted an action in the District Court to set aside the reports and orders of Division 1 and of the Commission entered on January 31, 1958, and June 15, 1959, respectively, denying the Sub 102 application.

On August 9, 1960, the District Court rendered its opinion (Appendix A, *infra*, pp. 1a–25a, 185 F. Supp. 838) and judgment (Appendix B, *infra*, p.

[3] Complaint, Appendix "B", page 6.

[4] Complaint, Appendix "D", page 31.

26a), setting aside the Commission's orders as being unlawful and void, and remanding the cause to the Commission for further proceedings consistent with such opinion.

## THE QUESTIONS ARE SUBSTANTIAL

This case presents the broad and important question of whether the Congress, in the 1957 amendments to the motor contract carrier provisions of the Interstate Commerce Act, has required the Interstate Commerce Commission to issue a contract carrier permit whenever a shipper shows a need for specialized service, without regard to the fact that existing motor common carrier services are adequate. The resolution of this issue will determine whether a very substantial volume of traffic is almost automatically allocated to motor contract carriage, with a corresponding erosion of the traffic potentially available to motor common carriers.

The 1957 amendments to Sections 203(a)(15) and 209(b) of the Act were the aftermath to this Court's decision in *United States* v. *Contract Steel Carriers,* 350 U.S. 409, 412 (1956), that "a contract carrier is free to aggressively search for new business within the limits of its license." Thus, Congress redefined the term "contract carrier by motor vehicle" in Section 203(a)(15) as "any person which engages in transportation by motor vehicle * * * under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of trans-

portation services designed to meet the distinct need of each individual customer." At the same time, Section 209(b) was amended to empower the Commission to limit the number of persons which can be served by a contract carrier so as to assure that its business remains contract carriage.

Prior to the 1957 amendments, Section 209(b) authorized motor contract carrier operations found by the Commission to be "consistent with the public interest and the national transportation policy." The 1957 amendments also added the following language:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.

This case arises out of the quoted amendment, and out of the history of the 1957 amendment to Section 203 (a)(15).

In the instant case, J-T Transport Co., Inc., sought authority to provide for Boeing Airplane Company a specialized service in the transportation of aircraft landing gear bulkheads from Indianapolis to Wichita which the Commission found to be within the new definition of contract carriage in Section 203(a)(15).

The application was opposed by U.S.A.C. Transport, Inc., a common carrier authorized to transport aircraft parts and equipment, crated or uncrated, between Indianapolis and Wichita. U.S.A.C., while a common carrier, specializes in the transportation of aircraft parts and engines (App. D, *infra*, p. 38a). The Commission denied J-T's application, concluding "(1) that the character of the shippers' transportation requirements is not such as to preclude their performance by a common carrier, (2) that U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application, (3) that in view of the adequacy of existing common-carrier service the supporting shippers would not be materially affected by a denial of the applications, (4) that the potential loss of traffic to U.S.A.C. outweighs any detriment to applicant, (5) that to authorize the proposed operations will not be consistent with the public interest and the national transportation policy, * * *" (App. D, *infra*, pp. 59a–60a). In so holding, the Commission stated that in considering the effect of issuing a permit upon the services of protesting carriers "There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of 'potential' traffic, even if they may not have handled it before," i.e., "that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized" * * * (App. D, *infra*, p. 50a).

1. The court below clearly erred in holding that the Commission had improperly placed upon the applicant (J-T) the burden of showing that existing com-

mon carriers were unable or unwilling to meet the shipper's needs. We submit that the Commission did not place such a burden of proof upon the applicant. Rather, since it affirmatively appeared that U.S.A.C. was already authorized to serve the points involved, was already performing a highly specialized service in transporting aircraft parts, and was able and willing to serve the shipper, and where the shipper had not availed itself of U.S.A.C.'s services, the Commission stated that "we cannot find that existing service has been shown to be inadequate" (App. D, *infra*, pp. 56a–57a). Under these circumstances, the lower court's conclusion as to burden of proof can only mean that the Commission may not take into consideration affirmative evidence that an existing carrier is authorized, able and willing to meet the shipper's needs.

2. The court below arrived at the same result by holding that the provision in Section 209(b) that the Commission shall consider "the effect which granting the [contract carrier] permit would have upon the services of protesting carriers," refers only to the diversion of traffic from a protesting carrier who is already serving the shipper, and does not permit consideration of the loss of potential traffic by existing carriers who are not presently serving the shipper but are able and willing to do so. In thus rejecting the Commission's position (long ante-dating 1957) that the loss of potential traffic by existing carriers is a significant factor to be considered, the court below recognized, at least by implication, that this was a factor properly considered by the Commission in de-

termining applications for motor common carrier certificates of public convenience and necessity. However, the court held that the 1957 amendments "give emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case", and prohibit consideration of this factor in determining contract carrier applications. To the contrary, we think it clear that Section 209(b) in requiring the Commission to consider both the effect of the grant of a permit upon the services of protesting carriers and the effect of a denial upon the applicant, cannot be read as requiring consideration of the potential loss of traffic to the applicant and prohibiting consideration of the potential loss of traffic to existing carriers.

3. More broadly, referring to the 1957 amendments, the court below declared that "The statute now contemplates two forms of motor carrier service. * * * In carrying out this new philosophy of motor carrier service, Congress has clearly indicated that the Commission must recognize contract carrier service as a form of transportation applicable when the special needs of each service are considered, under the national transportation policy" (App. A, *infra*, pp. 19a–20a). And again, "we emphasize that under the present statutory scheme, the shipper, the contract carrier and the common carrier all have coordinate interests; that there are now at least two forms of motor carrier service entitled to equal recognition, * * *" (App. A, *infra*, p. 25a). Clearly, the court below was of the view that the 1957 amendments, which originated in the Congressional belief that this Court's *Contract*

*Steel Carriers* decision gave too broad a scope to motor contract carriage, have in yet another way greatly enhanced the role of contract carriage at the expense of common carrier transportation. Not a word in the legislative history of the 1957 amendments reflects any Congressional understanding that this was their purpose.

The decision finds such a drastic change in national transportation policy by two deductions, both of which we believe to be erroneous. First, the Commission had proposed an amendment to Section 209(b) that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." As the court below noted, during the 1957 hearings before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., entitled *Surface Transportation-Scope of Authority of I.C.C.* (p. 22), the Commission proposed deletion of its own proposal "because of the very difficult burden of proof that would be imposed on applicants." We submit that sparing contract carrier applicants from the burden of proving that existing common carriers are unwilling or unable to provide a needed service, does not reflect a Congressional purpose that contract carrier permits shall be issued without regard to the potential effect upon existing common carrier transportation.

Secondly, the court below held that the five factors set forth in Section 209(b) to be considered by the Commission in determining whether a proposed con-

tract carrier operation would be consistent with the public interest and the national transportation policy, are exclusive and preclude the Commission from considering the adequacy of existing common carrier service (App. A, *infra*, p. 17a). We submit that the adequacy of existing motor carrier services is obviously pertinent in determining the effect of a denial upon the shipper—one of the factors which the Commission admittedly must consider. Again, nothing in the legislative history suggests that Congress even contemplated such a drastic change in the relative roles of motor contract and motor common carriage.[8]

4. The practical importance of this case arises from the fact, discussed in the Commission's report (App. D, *infra*, pp. 42a–43a), that many motor common carriers (such as U.S.A.C.) are engaged in performing transportation services which are as specialized as those of contract carriers. For example, both motor common and motor contract carriers engage exten-

[8] To the contrary, the General Counsel for the Contract Carrier Conference of American Trucking Associations, Inc., the author of the enumerated factors which were inserted in Section 209(b), told the Senate subcommittee (Senate Hearings, *supra*, p. 300): "* * * that the primary thing that we have always felt the Commission should do in those cases is consider not only the effect of granting this authority on the common carrier—they do that in each and every case—but to consider the effect denial will have on the contract carriers; the public interest is something to be balanced, and we think that both of those matters should be taken into consideration. * * *" There was no suggestion that the amendment would prohibit the Commission from continuing to consider the adequacy of existing common carrier services to meet the shipper's need.

sively in the transportation of automobiles and trucks in special vehicles. See *American Trucking Ass'ns* v. *United States*, 364 U.S. 1. More broadly, under present concepts of marketing and distribution, motor common carrier transportation is increasingly tailored, in such respects as equipment and schedules, to meet shipper needs. At the same time, however, the common carrier remains under obligation to provide all shippers within the scope of its authority with reasonable service at reasonable and non-discriminatory rates, while the contract carrier is free to select his customers and to charge varying rates for the same service. The maintenance of a healthy system of common carrier transportation has been a basic objective of Federal transportation policy. A substantial diversion of traffic to contract carriage could, as the Chairman of the Commission testified before the Senate Subcommittee in 1957 (Hearings, *supra*, p. 22) "seriously impair [the ability of common carriers] to render adequate service to the general public, particularly to the small shippers who depend almost entirely upon common carrier transportation, and seldom have enough business to justify entering into a contract with a contract carrier."* We submit that whether Congress intended to make a significant change in the relative roles of motor common and contract carriage should be determined by this Court.

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*The Senate Committee on Interstate and Foreign Commerce, in reporting the 1957 amendments, emphasized "the public interest in a sound transportation system, and particularly in a stable and adequate system of common carriage, * * *." Sen. Rep. 703, 85th Cong., 1st Sess., p. 7.

The immediate importance of these questions is shown by the facts that a three-judge court in the Western District of Arkansas has already rendered a similar decision in *Reddish* v. *United States et al.*, Civil Action No. 1531, decided October 19, 1960; the Commission had decided, after the 1957 amendments, 16 contract carrier application cases prior to and inconsistently with the decision below; and there are pending before the Commission for decision at least 42 additional contract carrier application cases which involve the same issues as the instant case.

## CONCLUSION

For the reasons stated, we believe that the questions presented by this appeal are substantial and are of such public importance as to require plenary consideration, with briefs and oral argument, for their resolution.

Respectfully submitted,

ROBERT W. GINNANE,
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JAMES Y. PIPER,
*Assistant General Counsel,*
*Interstate Commerce Commission,*
*Washington 25, D.C.*

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# APPENDIX A

In the United States District Court for the Western District of Missouri, Western Division

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No. 12497

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J-T TRANSPORT COMPANY, INC., PLAINTIFF

*vs.*

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

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Before JOHNSEN and MATTHES, *Circuit Judges,* and SMITH, *District Judge*

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R. JASPER SMITH, *District Judge:*

This is an action brought under Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of Title 28 United States Code, to enjoin, set aside and annul orders of the Interstate Commerce Commission dated January 31, 1958, and June 15, 1959, and to compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff in a proceeding under Section 205(g) of the Interstate Commerce Act (49 U.S.C.A. 305(g)), to grant to plaintiff a permit as a contract carrier of certain property by motor vehicle from Indianapolis, Indiana, to Wichita, Kansas. By leave of Court Contract Carrier Conference of American Trucking Associations, Inc. and Aerospace Industries Association of America, Inc., as

Intervening Plaintiffs, and U.S.A.C. Transport, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., and Common Carrier Conference—Irregular Route—of American Trucking Association, Inc., as Intervening Defendants, were allowed to intervene and file briefs.

Since 1953, plaintiff has held certain irregular route permits from the Commission as a contract carrier of property by motor vehicle. On March 14, 1957, it filed its application for an additional irregular route permit to authorize an extension of its operations in transporting aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis to Wichita. The application is supported by Boeing Aircraft Company, which operates a plant at Wichita for the production of airplanes.

The specific commodities to be transported are "landing gear bulkheads". They are purchased by Boeing from a manufacturer at Indianapolis, for installation at Boeing's assembly plant in Wichita. Each bulkhead weighs about 1,380 pounds, it has a value of about $24,000.00, and extreme care must be exercised in its transportation. Because of the nature of the commodity, crating as required for rail transportation is impracticable. Each bulkhead is manufactured for use in a particular airplane, and ordinarily, a bulkhead can be used only in the plane for which it is manufactured.

Operating under its temporary authority, plaintiff has designed a specially constructed trailer, 35 feet long, 12½ feet high, and 8 feet wide. It utilizes this equipment in transporting the commodities for Boeing. It is possible to haul four bulkheads in one load, without special crating. Plaintiff's Wichita Terminal is located near the Boeing Plant, special equip-

ment is assigned to the exclusive use of Boeing, and Boeing directs the movement of plaintiff's equipment which is available upon one hour's notice. The incoming bulkhead shipments are scheduled into Boeing's production line, for use on particular airplanes. Hence it is highly important that the bulkheads reach Boeing at a previously determined proper time to prevent disruption of production schedules. The bulkheads are unloaded directly into Boeing's production line. They are rigidly inspected by Boeing and the United States Air Force, and if there is material damage, they are returned to the Indianapolis plant. Security safeguards must be taken, and plaintiff's drivers all have "security clearance."

Rail service was used at one time, but the cost of crating, loading and unloading was prohibitive. Furthermore, because of Boeing's need to correlate these incoming shipments with its production schedule, rail service was not feasible.

U.S.A.C. Transport, Inc., as a motor common carrier, holds authority to operate, over irregular routes, in the transportation of aircraft parts, crated or uncrated, restricted to parts requiring special equipment or handling by reason of size, weight or fragile character, between the points involved in this application. It has never performed this transportation service for Boeing. It has indicated, however, that it, too, will design and construct any special equipment needed for hauling this commodity, and that it, in all other ways, stands ready and willing to serve Boeing's needs. It has no terminal or other facilities at Wichita, Kansas, although it does have terminal facilities at Indianapolis.

Boeing has urged that only very specialized contract carriage can reasonably satisfy its transportation requirements. Although it has not sought to

utilize U.S.A.C.'s service in this particular operation, it had experienced unsatisfactory service by U.S.A.C. on a prior occasion in 1953.

Initial hearing on plaintiff's application was completed in May, 1957. On July 18, 1957, the Examiner filed his report recommending that the application be granted, and that the permit for contract carrier operation be issued. After reviewing the evidence described above, the Examiner, upon finding that "a need has been shown for the proposed operation and * * * a grant of such authority will not adversely affect present transportation facilities to any material extent * * *," concluded that a grant of authority would be consistent with the public interest and the national transportation policy.

On January 31, 1958, after exceptions were filed to the Examiner's recommendation, Division One of the Commission, Commissioners Hutchinson and McPherson participating, adopted the Examiner's findings as to facts, but ruled that inasmuch as plaintiff had failed to establish that the proposed operation would be consistent with the public interest and the national transportation policy, the application would be denied. No mention whatever was made concerning tests prescribed by Sections 203(a)(15) and 209(b) of the Interstate Commerce Act, as amended August 22, 1957. The basis for the finding was expressed as follows:

> The existing services of the opposing carriers which appeared to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to be inadequate. * * * The burden is upon an applicant seeking contract carrier authority, as well as one seeking common carrier authority, to establish, among other things, that *there is a need for the serv-*

*ices proposed which existing carriers cannot or will not meet.* [Emphasis supplied.]

On July 25, 1958, the entire Commission denied petitions for reconsideration and oral argument. Subsequently, however, on October 16, 1958, the Commission reopened the proceeding for consideration, and the matter was held under advisement until June 15, 1959, when the decision of January 31, 1958, was reaffirmed.

In its second report, the Commission, in discussing the 1957 amendments to Sections 203(a)(15) and 209(b), observed that "the decisive factor" in ruling upon applications for contract carriage permits has always been whether "the available common carrier service was reasonably adequate" to "meet the reasonable transportation needs of those supporting the application", and that the 1957 amendments did not change this test. The Commission further concluded that, in determining the adverse effect upon protesting carriers, there is a presumption that an adverse effect will follow from a loss of *potential traffic,* even if it may not have been handled before. In further observing that Congress did not intend the tests of Section 209(b) to be exclusive, the Commission concluded that since the good of the national transportation policy as a whole must be considered, common carriers should be given the opportunity "to make an effective showing of their *willingness and ability* to provide needed service."

In applying the "new test", the Commission conceded that plaintiff met the definition of a contract carrier, and that, as to the number of contracts to be served, plaintiff is a "bona fide" contract carrier. It also conceded that the type of service proposed was properly that of a contract carrier (although common carriers might perform the same type of serv-

ice); it found that U.S.A.C. would be adversely affected by the grant; and it found that plaintiff would suffer no material adverse effects because its special equipment could be converted to other uses. As to the adverse effect upon Boeing, the Commission felt that this depended upon a determination of whether "existing service is adequate to meet their transportation requirements", and concluded that "(U.S.A.C.'s) ability and willingness to provide the service which (Boeing) require(s), and the fact that, with respect to the instant traffic (Boeing) has (not) attempted to avail itself of U.S.A.C.'s services, (prohibited a finding) that existing service has been shown to be inadequate." Commissioners Freas and Walrath concurred in the result. Commissioner Webb, in concurring, felt that the report prescribed a sixth test not authorized by Congress, and, in fact, specifically deleted by Congress, i.e., requiring the applicant to show that the protesting common carriers "are unwilling or unable" to meet the shipper's transportation requirements. Commissioner McPherson, who participated in the first report, dissented, concluding that Boeing required a specialized service which was within the definition of contract carriage, and upon weighing the effect of a grant or denial he would decide in favor of a grant of authority in this case. Commissioners Mitchell, Arpaia, and Winchell did not participate. Thus it appears that the report of June 15, 1959, represents the expressed views of four of the eleven Commissioners.

On August 22, 1957, significant changes were made in the Interstate Commerce Act in reference to contract carriers by motor vehicle. Our research indicates that this case is one of first impression in construing the provisions of the Act as amended. In testing the validity of the Commission's action here

we are required to make analysis of the present statutory base under which the Commission acted. It therefore becomes necessary briefly to summarize the events giving rise to the 1957 amendments to the Act.

Before the amendment, Section 203(a)(15) of the Act, 49 U.S.C.A., Section 303(a)(15), defined "contract carrier" in the following terms:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation * * * by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

Under old Section 209(b), 49 U.S.C.A. Section 309(b), in ruling upon applications for contract carriage permits, and apart from applicant's burden of showing that it was qualified generally as a contract carrier, the Commission was guided only by the requirement that the proposed service be "consistent with the public interest and the national transportation policy." In contrast, a *common carrier* was required to establish that its proposed operation was required "by the present or future public convenience and necessity." 49 U.S.C.A. Section 307(a).

In attempting to adjust the rights of contract and common carriers, the Commission found it necessary to expand and re-expand its interpretation of the Act. As a practical result, any difference in the standards and burden of proof on both types of applications became blurred, and sometimes interchangeable. Thus, in *William Heim Cartage Co., Inc., Ext.—Indianapolis,* 20 M.C.C. 329, 331, a *contract carrier* application, the Commission spoke in terms of applicant's burden of showing "that facilities of existing carriers * * * are inadequate, or that they they are not rendering a type or character of service

which satisfies the public need and convenience, and that the proposed service would tend to correct or substantially improve that condition."

In addition, the Commission began to read into Section 203(a)(15) a "specialization test" as a prerequisite to a finding of bona fide contract carriage. However, common carriers began to amend their tariffs so as to offer "specialized service" with the ultimate result that contract carriers frequently were denied their claims of specialization. In attempting to resolve the perplexities of applying the "specialization test," the Commission turned to a consideration of the *number* of shippers served by contracts, as a factor negating specialization.

Generally, common carriers complained that contract carriers, by adding more and more contracts to their service, in effect became common carriers, to the detriment of that section of the industry. Conversely, the contract carriers found that as common carriers likewise began to offer specialized services, aided by the Commission's specialization test and attitude toward the standards and burden of proof on contract carrier applications, it became increasingly difficult to secure contract carriage permits.

Although some prior steps had been taken by the Commission to secure legislation to "empower the Commission to limit the person or persons and the number or class of persons for which a contract carrier * * * may lawfully perform transportation services," and "to provide that motor contract carrier permits may be issued *only upon a showing that existing common carriers are unwilling or unable* to provide the type of service for which a need has been shown" (69th Annual Report of the Interstate Commerce Commission at page 132), the need for amendment of the Act was brought to the fore by the

decision of the Supreme Court in *United States* v. *Contract Steel Carriers,* 1956, 350 U.S. 409, 76 S. Ct. 461, 100 L. Ed. 482. There the Commission had directed the contract carrier to cease operations as a common carrier, basing its order in part, upon the fact that the carrier, by active solicitation, had secured sixty-nine contracts to serve shippers. In affirming the three-judge district court which had reversed the order, the Supreme Court disapproved the Commission's specialization test insofar as it sought to limit the number of shippers which a contract carrier could serve. Although not specifically ruling upon the use of the test as a whole, the Supreme Court found that "if specialization is to be read into 49 U.S.C. Section 303(a)(15), 49 U.S.C.A. § 303(a)(15) by the legislative history, it is satisfied here since appellee hauls only strictly limited types of steel products under individual and continuing contractual agreements with a comparatively small number of shippers throughout a large area." Ibid., 350 U.S. at page 411, 76 S. Ct. at page 463.

Following this decision, the Commission caused bills to be introduced in Congress, H.R. 5123 in the House of Representatives, and S. 1384 in the Senate. These measures, identical in their provisions, would have amended Section 203(a)(15) to redefine contract carriage as follows:

> The term "contract carriage by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce for compensation * * * under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.* [Emphasis added.]

Section 209(b) was to be amended by providing that a contract carrier permit could be issued only upon a showing "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown."

The inclusion of these clauses in the proposed amendments resulted in sharp opposition; and extensive hearings before the Senate Subcommittee are reported in a 358-page volume entitled "Surface Transportation—Scope of Authority of ICC—Hearings before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, Eighty-Fifth Congress, First Session." (No. 92433 U.S. Government Printing Office, Washington, 1957). During the hearings, the Commission proposed to delete the objectionable language in Section 209(b); i.e., "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown," inasmuch as this would impose a "very difficult burden of proof" on applicants. After hearings, the House drafted an entirely new bill, and the Senate Committee released a drastically amended version of S. 1384. Although both bills were virtually identical, S. 1384 was finally enacted as Public Law 85–163.

Section 203(a)(15) of the Act, 49 U.S.C.A., 303 (a)(15) as amended August 22, 1957, reads as follows:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) * * * and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation

services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Act (49 U.S.C.A. § 309(b)) as amended August 22, 1957, reads as follows:

> Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to Section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. *In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements.* The Commission shall specify in the permit the business of the

> contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under Section 204(a) (2) and (6): Provided, That within the scope of the permit and any terms, conditions or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: Provided further, That no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in Section 203(a)(15), as in force on and after the effective date of this proviso. [Italics supplied, representing a portion of the new matter added to this section.]

Thus while the Commission is still directed to issue a permit upon a finding that the proposed operation will be consistent with the public interest and the national transportation policy, in making this determination the Commission is now specifically required to

consider and apply five statutory tests; namely, (1) the number of shippers to be served by the applicant, (2) the nature of the service proposed, (3) the effect which granting the permit would have upon the services of protesting carriers, (4) the effect which denying the permit would have upon the applicant and/or its shipper, and (5) the changing character of that shipper's requirements.

With this legislative history in mind, we must determine whether the Commission acted within the scope of the statute in denying the application; and, if so, whether its findings are supported by substantial evidence, viewing the record as a whole.

Plaintiff urges that the effect of the Commission's decision is to apply the very standard first proposed in the amendments and subsequently withdrawn. With this contention we agree.

While the Commission apparently concedes that it no longer may deny a contract application upon the ground that applicant has failed to sustain the burden of proving that common carriers are "unwilling or unable" to perform the proposed service, it contends that in all instances under Section 209(b) it is proper to consider the "adequacy of existing services" in making a determination upon an application for new services. However, we are convinced that in determining whether a denial of the permit would adversely affect the shipper in this instance, the Commission gave improper consideration to U.S.A.C.'s *willingness and ability* to perform, and that it further erred in conceiving its responsibility under Section 209(b). The Commission goes beyond the language and scope of the statute when it assumes and requires:

(a) That applicant carries the burden of showing that existing services are inadequate; and

(b) That the expressed "willingness and ability" of opposing carriers, together with absence of proof that such service has been tried and found wanting, ipso facto vitiates a contention that the service is "needed" by shipper, or that denial of the application will have an adverse effect upon shipper.

Subsequent decisions of the Commission in contract carriage proceedings demonstrate rather forcibly that the Commission applied the "willing and able" test herein, and that it continues to pursue this course. In *Carolina Haulers, Inc., Contract Carrier Application*, No. MC–116825 (April 28, 1958) 76 M.C.C. 254, 256, we find the Commission stating:

> *If sound economic conditions are to be maintained in the industry and a strong transportation system developed, existing available motor carriers,* before being deprived of desirable and needed traffic which they are able to handle efficiently, *must be shown to be unwilling or unable to meet the shipper's reasonable transportation needs.* [Emphasis supplied.]

In *Leo Holt, Jr., Extension—Pilings*, No. MC–85087 (July 14, 1958) 77 M.C.C. 141 at page 144, this language is noted:

> Although both motor-carrier protestants are common carriers, there is no convincing evidence that applicant would provide any service to the supporting shipper which these protestants are *unable or unwilling* to provide * * * We conclude that applicant has failed to sustain his burden of showing a need for the proposed service. [Emphasis supplied.]

In *Wagner Contract Carrier Application*, No. MC–117010 (October 23, 1958), 77 M.C.C. 777, at page 781, it was stated:

> We have held repeatedly that the existing motor carriers are entitled to all authorized

> traffic that they can handle economically and efficiently, before a new competing service may be authorized therefor, unless it can show that such existing carriers are *unwilling or unable* to meet the public's reasonable transportation needs within the authorized territories. [Emphasis supplied.]

In *Roy D. Yiengst Common Carrier Application*, No. MC–117308 (April 17, 1959), 79 M.C.C. 265 at page 268, the Commission, in denying the petitioner's application as a *common carrier* for a certificate of *public convenience and necessity*, used language almost identical to that just quoted in the *Wagner* contract carrier application:

> We have held repeatedly that the existing motor carriers are entitled to all authorized traffic that they can handle adequately and efficiently before a new competing service may be authorized therefor, in the absence, as here, of any showing that the existing carriers are unwilling or unable to provide needed service within the authorized territories.

In *E. L. Reddish Contract Carrier Application*, No. MC–117391 (June 30, 1959), 81 M.C.C. 35, at page 40, the Commission, in citing its opinion here as authority for denial of the application, ruled upon applicant's contention that the willingness and ability of common carriers to provide the service should be given little weight by stating, "these issues were there (in the J–T case) resolved in a manner contrary to that urged by applicant; and it was found that the availability of common-carrier service is a relevant matter which must be considered in disposing of contract-carrier application."

As to the statements quoted in *Wagner* and *Yiengst, supra*, compare the 1939 statement of the Commission

in *William Heim Cartage Company, Inc., Extension—Indianapolis,* 20 M.C.C. 329, *supra,* at page 332:

> The Commission has consistently stated that it is its belief that, in order to foster a sound transportation system, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation * * *.

It is conceded that the purpose of the new legislation was to give the Commission more helpful standards than were contained in the present law. Certainly the burden of proving a contract carrier operation to be consistent with the public interest and the national transportation policy was not eliminated by the 1957 amendment.[1] The standards of meeting

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[1] The National Transportation Policy, 49 U.S.C.A. note preceding Section 301, enacted September 18, 1940, provides as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of the Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy."

this responsibility were changed, however, and as we read the statute these standards do not involve a showing that common carriers are unwilling or unable to handle the traffic; or, stated otherwise, that common carrier service is inadequate. Under old Section 209(b), the only statutory requirement to qualify as a contract carrier was that the transportation be performed under individual contracts, and there was no limitation on the number of contracts. There was nothing to prevent a contract carrier, once it obtained a permit, from aggressively searching for new business within the limits of his permit, even though the authority may have been granted originally on the basis of the support of a single shipper.

The new sections sharply redefine contract carriage and give the Commission power to limit the number of contracts which a contract carrier can maintain. The Commission acquired the power to limit the service of the contract carrier to the shipper or shippers supporting the application. Congress set forth specific criteria to be considered, and deleted the test previously applied by the Commission involving a determination of adequacy of existing common carrier service.

Defendants suggest that the specific criteria enumerated in the statute are not exclusive, but are only guides to be considered "among other things" in the context of the public interest and the national transportation policy. Of course the ultimate determination is whether or not a proposed contract carrier operation is consistent with the public interest and the national transportation policy. In making this determination, however, the Commission is directed specifically to consider five definite criteria. When the Commission injects a sixth criterion, specifically rejected by Congress, it clearly has erred.

The Commission by its orders found that plaintiff fulfilled the statutory requirements for a "contract carrier by motor vehicle" as prescribed by Section 203(a)(15). In applying the criteria prescribed by Congress in Section 209(b), the Commission correctly found that plaintiff met the requirements of the first and second tests, and, by implication, the fifth test. The decisive questions here involve the third and fourth criteria, requiring a consideration of the effect which granting the permit may have upon the services of protesting carriers, as well as the effect which denying the permit would have upon the applicant and its shipper.

Consideration of the effect on the services of protesting carriers does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather what effect, if any, granting a permit would have on the existing services of that carrier. The Commission bases its decision here on the presumption that if an existing common carrier is able and willing to perform services for the shipper or, stated alternatively, that existing common carrier service is adequate, the effect on existing protesting common carrier services is adverse. Thus, since the Commission aids itself by a presumption, under this interpretation the "very difficult burden of proof" remains with the applicant and proposed shipper to negate the adverse effect on existing common carriers. The effect of this is to inject precisely the standard which was deleted by Congress at the time of enactment of the new section.

The consideration of the effect on the services of protesting carriers is designed to afford a measure of protection for those carriers. This criterion does not contemplate consideration of the mere existence or availability of a protesting carrier, but rather

what effect, if any, granting of a permit would have on the services of the carrier. If the protesting carrier was actually serving a shipper and participating in the traffic involved, the granting of a permit would divert traffic from the protesting carrier, and if this diversion would cause the services of the protesting carrier to be adversely affected to a material degree, this element certainly should be considered by the Commission. Where, however, the protesting carrier is not participating in the traffic involved, there can be no diversion of traffic and hence ordinarily there would be no adverse effect on the services of the protesting carrier.

The fourth criterion involves a consideration of the effect which denying a permit would have on the applicant and/or its shipper. This provision quite obviously was inserted in order to protect the shipper and the applicant, and to insure that their interests would receive the same consideration and be weighed in the same balance as those of opposing carriers. And to a notable degree, this provision emphasizes the new distinction required by Congress between a common carrier certificate of public convenience and necessity, and the contract carrier's permit.

It is quite clear that the Commission has entirely misconceived the purport of the 1957 amendments, and its function and duty with regard to the criteria set out in Section 209(b). The Commission continues to cling to its old tests and reasoning, and Congress has decreed otherwise.

The statute now contemplates two forms of motor carrier service. And quite obviously and clearly, under the statute a contract carrier's permit cannot be limited and restricted to cases where no common carrier service is available. Now an element of shipper's service has been affirmatively recognized by

Congress, and here it is quite clear that the proposed contract carrier service is designed to meet the distinct particular needs of Boeing and that in its operation it has met that need. Under the statute a shipper is entitled to have his distinct needs met. In carrying out this new philosophy of motor carrier service, Congress has clearly indicated that the Commission must recognize contract carrier service as a form of transportation applicable when the special needs of each service are considered, under the national transportation policy.

The new statute says that a permit *shall* be issued if it appears that the applicant is fit, willing and able to perform, and that the proposed operation will be consistent with the public interest and the national transportation policy. Note that this does not say that grounds for a certificate of public convenience and necessity must exist. Note further that the criteria set out in Section 209(b) are factors to be considered. The term "considered" may be defined in this connection as weighed or balanced. This does not mean necessarily, that because an applicant fails to meet affirmatively all five of the standards or tests prescribed by Congress, the Commission is warranted in rejecting the application. It must be recognized that Congress intended to and did by the contract carrier provisions of the statute establish a complementary system of motor transportation insofar as this was possible as a matter of consistency with the public interest and the national transportation policy declared in the Act.

Thus, in weighing these various factors, one against the other, we reach the conclusion that even though the Commission may find that issuance of a permit will in fact adversely affect a protesting carrier, that in and of itself does not necessarily justify a denial

of the permit. The statute does not say, "The permit shall be issued, unless an existing carrier will be adversely affected." It does set out clearly and concisely the standards by which the Commission must be guided, and there is no longer a need to resort to special tests beyond the language of the statute, which may have been necessary in making determinations prior to the amendments. The five criteria in Section 209(b) are broad and inclusive, and when given proper application, in light of the evidence, the Commission should, without the injection of other factors, be able to make a proper disposition of the application.

We conclude that decisions turning solely on the "adequacy-willingness and ability" test cannot be justified and are clearly erroneous. There can be no doubt that this case was decided by the Commission on that basis. Nothing in the record before us warrants a denial of the application on any other grounds. Here a distinct need of an individual customer for specialized service and equipment was shown. A shipper desired it and asked for it, and within the scope of the revised definition of a contract carrier, the shipper's desires and the applicant's ability to meet them have achieved substantial pertinence.

Since the order denying the application must be vacated, we observe further that apart from the fact that a finding of an adverse effect upon U.S.A.C. would not in and of itself justify a denial of the application, there is in this record no substantial evidence to support the Commission's finding that the issuance of the permit would adversely affect the *services* of U.S.A.C. which had never handled or transported the commodities in question. Since U.S.A.C. is not participating in the traffic and never

has been, the permit cannot possibly divert such traffic. There is no evidence in the record that if the permit is denied, U.S.A.C. or any other existing carrier will ever be permitted to serve the needs of Boeing. And in this connection it should be noted that in reaching the conclusion that the shipper will suffer no adverse effect because U.S.A.C. is willing and able to perform, the Commission has entirely ignored the affirmative evidence of Boeing's specific need for a contract type service and the special problems it faces. No consideration was given to the special services which in fact could not be supplied by a common carrier. The Commission has neatly solved the problem with its finding that common carrier service is "adequate". Inasmuch as the "willing and able" test at times seems indistinguishable from, and in the eyes of the Commission, synonymous with, the "adequacy test", a finding by the Commission that existing common carrier service is "adequate to meet the reasonable transportation needs" of the shipper fails to take into account that the new test under Section 203(a)(15) is whether the service is "designed to meet the *distinct need* of each individual customer." While existing *specialized services* of common carriers may very well be adequate to supply the shipper's *"reasonable transportation needs"*, that existing service may not in fact meet the *distinct* or *specific* need of the supporting shipper.

We conclude that to the extent the Commission has ruled that the burden is on applicant to show the protesting common carriers are unable or unwilling to meet the shipper's reasonable transportation requirements, the standard is not supported by the language of Section 209(b), whether it goes under the guise of an "adequacy test" or otherwise. It in effect injects into the Act the very qualifications and limita-

tions suggested by the deleted portions of the amendment. The Commission may not rule that the proposed service fails to qualify as contract carriage under Section 203(a)(15) inasmuch as the service is, or may be "provided by common carriers." Neither may the Commission deny a permit under Section 209(b) because the applicant has failed to establish that existing common carriers are "unwilling or unable to provide the type of service for which a need has been shown."

We conclude generally that to the extent that the Commission has attempted to apply substantially the same tests for determining public convenience and necessity as it relates to common carriage to the narrowly restricted language of the statute relating to consistency with the public interest as it applies to contract carriage, the action is not supported by the language of Section 209(b).

It is of interest to note that at one time the Commission recognized a difference in the standards of proof required to show consistency with the public interest incident to a contract carrier's permit, as compared to the certificate of public convenience and necessity required for a common carrier. Earlier, it was required that once a contract carrier applicant had established a prima facie case, there was some burden on the protestants to come forward with evidence in rebuttal. See *Jason W. House Contract Carrier Application,* 1 M.C.C. 725. At about the same time the Commission held that the availability of adequate common carrier service alone did not preclude the granting of a contract carrier authority. See *T. J. Broom Contract Carrier Application,* 1 M.C.C. 425; *Howard W. Juett Contract Carrier Application,* 1 M.C.C. 268. Clearly the effect of the amended statute is to restore these procedures to a degree, and to give

emphasis to the shipper's preference, which underlies the special concept of contract carriage in any case. And it is clear that under the narrow definition of contract carriage found in the new law, there is no occasion, necessity or warrant for the same standards of proof in both applications.

The Commission cites many of its own rulings since the 1957 amendments under the well established theory that contemporaneous construction of a statute by those charged with its execution is entitled to great weight and should be affirmed unless clearly erroneous. However, the construction of a statute is a matter ultimately for the Courts to determine. Where the Commission's construction is clearly erroneous, the rule contended for does not apply. See *Woods* v. *Benson Hotel Corp.*, 177 F. 2d 543, (8th Cir. 1949); *Texas & Pacific Ry. Co.* v. *United States*, 289 U.S. 627, 53 S. Ct. 768, 77 L. Ed. 1410; *Mid-Continent Petroleum Corp.* v. *N.L.R.B.*, 204 F. 2d 613 (6th Cir. 1953), certiorari denied 346 U.S. 856, 74 S. Ct. 71, 98 L. Ed. 369.

Plaintiff urges that we compel action by the Interstate Commerce Commission unlawfully withheld upon the application of plaintiff, and requests that we direct the Interstate Commerce Commission to issue to plaintiff a permit authorizing it to perform the transportation recommended by the Examiner. We have no such authority. Courts of review have no power to order an administrative body to perform discretionary acts in a particular manner, or themselves to exercise administrative functions. See *Interstate Commerce Commission* v. *United States ex rel. Members of Waste Merchants' Association*, 260 U.S. 32, 43 S. Ct. 6, 67 L. Ed. 112; *Work* v. *United States ex rel. Rives*, 267 U.S. 175, 45 S. Ct. 252, 69 L. Ed. 561; *Federal Power Commission* v. *Idaho*

*Power Company,* 344 U.S. 17, 73 S. Ct. 85, 97 L. Ed. 15.

In the final analysis the Commission has the responsibility for determining what is best for the public interest and the national transportation policy, weighing the various criteria that Congress has provided. The most that the courts may require is that all relevant factors be weighed carefully and fairly, and in this case, that no application be brushed aside upon the ground that an existing carrier wishes to perform the service. Again we emphasize that under the present statutory scheme, the shipper, the contract carrier and the common carrier all have coordinate interests; that there are now at least two forms of motor carrier service entitled to equal recognition, and that the interests of each must receive a fair consideration in reaching a determination which is consistent with the public interest and the policy of Congress with reference to national transportation.

For the foregoing reasons judgment will be entered setting aside the orders of the Interstate Commerce Commission and declaring them unlawful and void, and remanding the case to the Commission for further proceedings consistent with the rulings expressed here.

## APPENDIX B

**In the United States District Court for the Western District of Missouri, Western Division**

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**Filed Aug. 9, 1960**

**J. C. Truman, Clerk, by Arlie G. Grout, Deputy**

**No. 12497**

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**J-T TRANSPORT COMPANY, INC., PLAINTIFF**

*v.*

**UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS**

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**Before JOHNSEN and MATTHES, *Circuit Judges*, and SMITH, *District Judge***

**This opinion prepared by Judge Smith and this day filed is hereby approved and adopted as the opinion of the Court, and pursuant thereto**

***It is hereby ordered, adjudged and decreed* that the orders of the Interstate Commerce Commission involved here be and are set aside as being unlawful and void, and the case is remanded to the Commission for further proceedings consistent with the views and rulings expressed in said opinion.**

(S) HARVEY M. JOHNSEN,
*Circuit Judge.*

(S) M. C. MATTHES,
*Circuit Judge.*

(S) R. JASPER SMITH,
*District Judge.*

# APPENDIX C

## Interstate Commerce Commission

### No. MC–11185 (Sub-No. 100) [1]

### J-T Transport Company, Inc., Extension—Columbus, Ohio

DECIDED JANUARY 31, 1958

Operation by applicant as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC–11185 (Sub-No. 100), of uncrated airplane parts and equipment, (except airplane engines) which because of their fragile nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC–11185 (Sub-No. 102), of aircraft assemblies from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

*James F. Miller* for applicant in No. MC–11185 (Sub-No. 100).

*James W. Wrape* and *Louis I. Dailey* for applicant in No. MC–11185 (Sub-No. 102).

*Paul F. Sullivan* and *James K. Knudson* for a protestant in both proceedings.

*Douglas McHendrie* and *Ernest A. Brooks II* for protestants in No. MC–11185 (Sub-No. 102).

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[1] This report also embraces No. MC–11185 (Sub-No. 102), J-T Transport Company, Inc., Extension—Indianapolis, Ind.

REPORT OF THE COMMISSION

DIVISION 1, COMMISSIONERS HUTCHINSON, WALRATH, AND MCPHERSON

BY DIVISION 1:

These applications were heard separately and were the subject of separate reports and recommended orders of examiners. Since, however, related issues are involved, they will be disposed of here in a single report.

Exceptions to the order recommended by the examiner in the title proceeding were filed by protestant, and applicant replied. In the subtitled proceeding, exceptions to the order recommended by the examiner were filed by rail protestants and by a motor-carrier protestant, and applicant replied. Our conclusions differ from those recommended in each proceeding.

In the title proceeding by application filed October 17, 1956, J-T Transport Company, Inc., of Kansas City, Mo., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of uncrated airplane parts and equipment (except airplane engines) which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio.

In No. MC–11185 (Sub-No. 102), by application filed March 14, 1957, the same applicant seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of aircraft assemblies, uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans.

U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., opposes both applications, and Ace Dran Hauling and Rigging Co., Daniel Hamm Drayage Company, Al Jeffries Trucking Co., Nieman Transfer and Storage Co., Taylor Heavy Hauling Co., Belger Cartage Service Inc., and class I rail carriers in western trunkline territory oppose the No. MC–11185 (Sub-No. 102) application.

The examiner in each proceeding recommended a grant in its entirety of the considered application. In the title proceeding, on exceptions, U.S.A.C. assigns error to the examiner's findings (1) that the shipper requires a type of service which cannot be rendered by it, and (2) that the evidence warrants the granting of the authority sought. It asserts that the examiner erred in failing to find that the shipper's support is based on preference rather than need for service. It also argues that the record does not establish a basis for the inclusion of the term "equipment" in the recommended commodity description, and that if any authority is granted applicant, it should be restricted to a one-way movement. Applicant in reply contends (1) that the record is clear that the shipper requires the specialized service proposed, (2) that applicant is the only carrier of record capable of performing this type of service, and (3) that a two-way service is needed. It urges approval of the examiner's findings.

On exceptions in No. MC–11185 (Sub-No. 102), rail protestants object to the commodity description recommended by the examiner as being too broad, stating that it should be limited to "landing gear bulkheads." In its exceptions U.S.A.C. asserts that the examiner's findings ignore the fact that it is a specialized common carrier of aircraft parts and is experienced in the handling of delicate or fragile shipments; that the

shipper's desire for a contract carrier with a terminal at Wichita is not in itself sufficient reason for granting the application; that it has equipment with which to perform a service similar to that proposed; that it is willing, if necessary, to modify its existing trailers to the extent required; and that existing common-carrier service has not been shown to be inadequate in any material respect. It further contends that in this and other pending proceedings applicant, with the cooperation of the supporting shipper, plans to siphon off lucrative traffic, leaving it to haul the less desirable shipments; that in so doing, applicant's *modus operandi* is to construct a special trailer before seeking operating authority, whereupon it asserts that no existing carrier has the type of equipment required to perform the proposed service. Applicant in reply denies generally the contentions of exceptants and urges that the application be granted.

The evidence adduced in each proceeding, the examiner's recommendations, the exceptions, and the replies thereto have been considered. We find the statements of facts contained in the examiners' reports to be accurate in all material respects, and, as hereinafter amplified or restated for clarity of discussion, we adopt such statements as our own.

Applicant is a contract carrier by motor vehicle of uncrated aircraft parts and equipment and conducts substantial operations between various points in the West and Midwest. It holds temporary authorities, conditioned to expire upon final determination of these proceedings, to transport the commodities from, to, and between the points applied for in the two applications. The application in the title proceeding is supported by North American Aviation, Inc., hereinafter called North American, and the other application

is supported by Boeing Airplane Company, hereinafter called Boeing.

North American manufactures principally military aircraft. It subcontracts for parts which are shipped to its Columbus plant for use in the assembly of finished aircraft. As pertinent here, certain items are purchased f.o.b. from subcontractors in Grand Prairie and Garland. These items are made of metal highly susceptible of damage and must be transported in closed equipment for reasons of protection and security. This shipper previously used air freight for the transportation of these items. However, when the airline introduced a type of plane whose smaller doors would permit the loading of certain of the items, the shipper requested applicant to perform the service. This shipper is using applicant's service from points of origin other than those involved here; and such service, together with that rendered by applicant under temporary authority, is satisfactory. Production schedules for the assembly of finished aircraft are such that the shipper must control and direct the movement of the considered commodities, and the traffic must be handled with meticulous care. Specially designed transportation equipment must be used. Applicant modified certain of its equipment to meet the specifications of the shipper.

Boeing assembles aircraft at Wichita. Prior to its use of applicant, this shipper used rail service for the transportation to its Wichita plant of landing-gear bulkheads from Indianapolis. Rail service proved unsatisfactory, however, because of slow transit time and because of the necessity of using expensive crating to protect the lading from damage. Specially designed motor-carrier equipment is required, and applicant modified certain of its equip-

ment to meet the specifications of this shipper. Applicant's service under temporary authority is satisfactory.

Two of the three motor common carriers which submitted evidence in opposition to the application in No. MC–11185 (Sub-No. 102) are so-called heavy haulers, one with authority to operate between points in Missouri and Kansas, and the other holding authority to operate between points in Indiana and Missouri. By an interline arrangement at Kansas City, these two claim to be able to handle aircraft landing-gear bulkheads to Boeing's satisfaction.

U.S.A.C. is authorized, as here pertinent, to transport aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) from Indianapolis to Wichita. It specializes in the transportation of aircraft parts and equipment, and operates 173 tractors and 225 trailers. It has a terminal at Dallas, Tex., approximately 15 miles from Grand Prairie and Garland, and one at Wichita. It is willing and able to modify as much of its equipment as is needed to meet the shippers' specifications but has never been requested by either supporting shipper to do so. Because of its specialization in the transportation of aircraft parts and equipment, it is able to adapt its operations to any production schedules which shippers may set up. Neither North American nor Boeing has attempted to avail itself of the services of U.S.A.C. or, so far as these records show, of any other common carriers.

Here we have a situation in which the supporting shippers have made no attempt to utilize the services of existing carriers, one of which specializes in the transportation of the commodities here involved. True, applicant specially modified certain trailers for

use in the transportation of the aircraft parts here involved and has satisfactorily served the supporting shippers under its temporary authorities. But neither these facts nor the desire of the supporting shippers to continue utilizing applicant's service, standing alone, is sufficient to warrant a grant of the authority sought. The existing services of the opposing carriers which appear to be in a position to handle the described traffic and are willing to modify equipment if necessary, have not been tried, much less shown to be inadequate. In fact, no attempt whatsoever has been shown to have been made to ascertain if the existing service is capable of meeting the needs of the supporting shippers. The burden is upon an applicant seeking contract-carrier authority, as well as one seeking common-carrier authority, to establish, among other things, that there is a need for the service proposed which existing carriers cannot or will not meet. Compare *Girton Bros., Inc., Extension—Louisville,* 69 M.C.C. 229, and *Warren Transport, Inc., Common Carrier Application,* 69 M.C.C. 241. A service not needed cannot be found consistent with the public interest or the national transportation policy.

In No. MC–11185 (Sub-No. 100) and No. MC–11185 (Sub-No. 102), we find that applicant has failed to establish that the respective proposed operations are consistent with the public interest and the national transportation policy, and that each application should be denied. An appropriate order will be entered.

COMMISSIONER WALRATH, being necessarily absent, did not participate in the disposition of these proceedings.

# APPENDIX D

## Interstate Commerce Commission

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### No. MC–11185 (Sub-No. 100)[1]

### J-T Transport Company, Inc., Extension—Columbus, Ohio

DECIDED JUNE 15, 1959

Upon reconsideration, findings in the prior report, 74 M.C.C. 324, decided January 31, 1958, affirmed. Operation by applicant as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC–11185 (Sub-No. 100), of uncrated airplane parts and equipment (except airplane engines), which because of their fragile nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC–11185 (Sub-No. 102), of aircraft assemblies uncrated, which because of their fragile nature require special handling and special equipment, from Indianapolis, Ind., to Wichita, Kans., found not shown to be consistent with the public interest and the national transportation policy. Applications denied.

Appearances as shown in the prior report, and, in addition, *Harry R. Brashear, Clarence D. Todd, Dale C. Dillon, Vern W. Porter, Robert J. McBride, Albert B. Rosenbaum, Roland Rice, John C. Bradley,* and *James E. Wilson* for interveners in one or both applications.

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[1] This report also embraces No. MC–11185 (Sub-No. 102), J-T Transport Company, Inc., Extension—Indianapolis, Ind.

REPORT OF THE COMMISSION ON RECONSIDERATION

BY THE COMMISSION:

In these proceedings J-T Transport Company, Inc., of Kansas City, Mo., seeks permits authorizing operations, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, (1) in No. MC–11185 (Sub-No. 100) of uncrated airplane parts and equipment (except airplane engines), which parts and equipment because of their delicate nature require special handling and special equipment, between Grand Prairie and Garland, Tex., on the one hand, and, on the other, Columbus, Ohio, and (2) in No. MC–11185 (Sub-No. 102) of aircraft assemblies,[2] uncrated, requiring special handling and special equipment because of their fragile nature, from Indianapolis, Ind., to Wichita, Kans. U.S.A.C. Transport, Inc., hereinafter called U.S.A.C., opposes both applications and six so-called heavy haulers, and class I rail carriers in western trunkline territory also oppose the No. MC–11185 (Sub-No. 102) application.

In the prior report, 74 M.C.C. 324, decided January 31, 1958, division 1 denied both applications. Petitions for reconsideration and a request for oral argument were filed by applicant in each proceeding; Aircraft Industries Association of America, Inc., and the Contract Carrier Conference of the American Trucking Associations, Inc., filed petitions for leave to intervene in support of applicant and for reconsideration or further hearing in both proceedings; and North American Aviation, Inc., intervener in support of applicant, filed a petition for reconsideration in the title proceeding. U.S.A.C. replied to each petition.

[2] Applicant in its petition for reconsideration and request for oral argument, dated April 12, 1958, indicated a willingness to restrict the commodity description to "landing gear bulkheads."

By order of July 25, 1958, Aircraft Industries Association and the Contract Carrier Conference were permitted to intervene, and the petitions were denied in all other respects. Upon further consideration of the records and of second petitions in each proceeding by applicant for reconsideration, and of replies thereto by U.S.A.C., we reopened the proceedings for reconsideration on the present records. Subsequently, the Common Carrier Conference-Irregular Route and the Regular Common Carrier Conference of the American Trucking Associations, Inc., were permitted to intervene.

The material facts in each proceeding are not in dispute. Applicant, a motor contract carrier of uncrated aircraft components and assemblies, conducts operations between various points in the West and Midwest. It maintains terminals at Wichita and Kansas City, Kans., and Grand Prairie, and operates 33 tractors and 45 trailers. Each of its trailers is suitable for transporting aircraft parts, and each is equipped with special fixtures designed to handle the particular parts transported. It regularly assigns certain vehicles to each of its various customers for its exclusive use, and at the time of the hearing was serving eight different aircraft manufacturers. Its drivers have security clearance.

North American Aviation, Inc., hereinafter called North American, supports the title application. It is a principal contractor with the Federal Government for certain types of military aircraft which it produces at its plant in Columbus. Certain component parts of these aircraft, such as fuselage sections, flaps, tips, and pylons, are purchased f.o.b. from subcontractors located at Grand Prairie and Garland. These items are constructed principally of titanium, aluminum, and stainless steel and are highly sus-

ceptible to damage; therefore, they must be transported in specially fitted, closed equipment for protection as well as for security reasons. Because of their intended use as components of airplanes, it is essential that the parts arrive in perfect condition. Likewise, dependable service is of the essence as it is not practicable to stockpile these articles; and, unless the parts arrive undamaged and according to schedule, North American's assembly-line schedule is disrupted. This shipper formerly used airfreight for the transportation of these items but occasionally there was damage to some of the parts which moved by air; and when the airline introduced a type of plane whose smaller doors would not permit the loading of certain of the items it requested applicant to provide the service. Applicant modified 2 of its trailers to fit specifications submitted by this shipper; assigned this equipment to its exclusive use; and pursuant to appropriate temporary authority transported 18 shipments between Grand Prairie and Garland, on the one hand, and, on the other, Columbus during a 3-month period. Its service was entirely satisfactory and the shipper desires its continuance. Although the shipper knew of U.S.A.C.'s service, it did not request this carrier to provide equipment or offer it the traffic.

Boeing Airplane Company, hereinafter called Boeing, supports the No. MC–11185 (Sub-No. 102) application. A manufacturer at Indianapolis supplies Boeing with landing-gear bulkheads which it installs in planes at its Wichita assembly plant. The dimensions of the forward and aft bulkheads are 128 by 90 by 42 inches and 122 by 181 by 24 inches, and they weigh 1,380 and 1,340 pounds, respectively. The service needed as regards the movement of landing-gear bulkheads are similar to those of North American in

that these articles, because of their nature, must be transported in specially designed, closed equipment, with their delivery being made in accordance with Boeing's production schedule. While applicant must deadhead its equipment 700 miles from Wichita to Indianapolis to perform the proposed service, it has sufficient advance notice to schedule the movement. Prior to the use of its service under appropriate temporary authority the shipper used rail service, but the necessity of constructing special containers made the cost of this service prohibitive. During a 4-month period applicant transported about four shipments a month in one of its trailers equipped with special fixtures for transporting this particular shipper's traffic and assigned to the exclusive use of the shipper. This service has been highly satisfactory. Although the shipper knew that U.S.A.C. was authorized to perform the proposed service, it did not request that carrier to supply equipment for the reasons that U.S.A.C.'s tariff provides that it can exercise control over the type of equipment that will be used for any particular shipper, and, in 1953, it had unsatisfactory experiences in the use of U.S.A.C.'s service.

U.S.A.C. holds certificates authorizing it, insofar as here pertinent, to transport, over irregular routes, aircraft parts and equipment, crated or uncrated, (1) between Garland and Grand Prairie, on the one hand, and, on the other, Columbus, and (2) between Indianapolis and Wichita. Approximately 60 percent of its traffic consists of aircraft parts other than engines and the remainder consists principally of aircraft engines. As a result of having served the aircraft industry almost exclusively over a period of years, it is accustomed to modifying its equipment to meet the specific requirements of particular aircraft manufacturers, and it is able to tailor its service to fit the pro-

duction schedules esablished by its customers. It maintains, among others, terminals at Dallas, Tex., approximately 15 miles from Garland and Grand Prairie, and at Topeka, Kans., and Indianapolis. It operates 173 tractors and 225 trailers, some of which, if fitted to the shippers' specifications, would be suitable for transporting the considered traffic. Its drivers are required to have security clearance. If tendered the considered traffic, it would modify and make available to the shippers whatever equipment is necessary to meet their transportation requirements.

Two so-called heavy haulers, both common carriers, submitted evidence in opposition to the No. MC–11185 (Sub–No. 102) application. Belger Cartage Service, Inc., holds authority to operate between points in Missouri and Kansas, and Daniel Hamm Drayage Company is authorized to operate between points in Indiana and Missouri. By interlining at Kansas City, they purport to be able to handle aircraft landing gear bulkheads to Boeing's satisfaction. There is also interline rail service from Indianapolis to Wichita.

In the prior report division 1 found that the motor transportation desired by North American and Boeing could be provided adequately by U.S.A.C.; that there was no need shown for the proposed service; and that the applicant had failed to establish that the proposed operations would be consistent with the public interest and the national transportation policy. On petition applicant contends (1) that the type of service required to meet the supporting shippers' reasonable transportation requirements in each proceeding can only be provided by a contract carrier; and that protestants, all common carriers, are not authorized to perform such service, (2) that the decision in the prior report is at variance with that of the district

court in *Bass* v. *United States*, 163 F. Supp. 1, hereinafter referred to as the *Bass* case, because of a failure to consider whether adequate contract-carrier service was available, (3) that the criteria as set forth in sections 203(a)(15) and 209(b), as amended, of the Interstate Commerce Act, must be determinative of applications seeking contract-carrier authority, and that proper consideration has not been given to these sections of the statute, (4) that the legislative history preceding the 1957 amendments to the sections referred to in (3) above reveals that willingness and ability of common carriers to transport the traffic should not bar a grant of contract-carrier authority, (5) that as a practical matter, U.S.A.C. does not have the specialized equipment required for the considered movements, could not adapt its equipment to handle this traffic, and is unable to provide the personalized service which the supporting shippers require, and (6) that a denial of the applications would give U.S.A.C. a monopoly with respect to the traffic.

U.S.A.C. replies (1) that, as a specialized carrier of aircraft parts, albeit a common carrier, it offers and can provide substantially the same type of service as that proposed by applicant; and that it is willing to modify its equipment to meet the shippers' specialized needs and to dedicate certain of its equipment to the shippers' exclusive use, (2) that sections 203(a)(15) and 209(b) do not contain the sole elements for consideration in the disposition of applications for contract-carrier authority, (3) that the 1957 amendments to the act affecting contract carriers do not relieve an applicant seeking contract-carrier authority of the burden of establishing a need for the proposed service, (4) that, inasmuch as the supporting shipper in each case has failed to use its services, existing service

has not been shown to be inadequate, and (5) that it should be afforded a reasonable opportunity to demonstrate its available service before an additional competitive service is authorized.

DISCUSSION AND CONCLUSIONS

In view of the issues raised by the pleadings with respect to the interpretation to be placed upon the 1957 amendments of sections 203(a)(15) and 209(b) of the act, we deem it appropriate to discuss fully the matters of statutory construction presented herein in the light of the background of our prior consideration and disposition of applications for contract-carrier operating authority, of decisions in which the distinction between common and contract carriage has been explored, and of the events which led to the enactment of these amendments.

Prior to the 1957 amendments to the act, the definition of a contract carrier by motor vehicle, contained in section 203(a)(15) provided:

> The term "contract carrier by motor vehicle" means any person which, under individual contracts or agreements, engages in the transportation (other than transportation referred to in paragraph (14) and the exception therein) by motor vehicle of passengers or property in interstate or foreign commerce for compensation.

The definition of a common carrier by motor vehicle, which was not affected by the 1957 changes in the act, contained in section 203(a)(14) reads:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation * * *.

Over a period of some 20 years literally hundreds of new service or extensions-of-service contract-carrier applications requiring the application of the above-stated definition in relation to other sections of the act have been considered and disposed of by this Commission. In these proceedings certain distinctions between motor contract carrier and motor common carrier operations have evolved, and for a clear understanding of the matters under consideration here some discussion of this historical development preceding the 1957 amendments is appropriate at this point.

The only limitation imposed by definition upon transportation which may be provided by a motor common carrier is that it must be held out to the public generally. In other words, a motor common carrier is required through its tariffs to make a continuing offer to the general public of any service which it proposes and which it is authorized to perform. Other than this requirement and those limitations contained in its certificate with respect to commodities, territories, or otherwise, no restriction is imposed upon the manner in which a common carrier may perform its physical operations, provided, in all instances, that the same service is made available to all who may desire to use it. It may perform, and in numerous instances the terms of its certificate limit its operations to the performance of, a so-called special service. On occasions the very terms of a common carrier's certificate make it necessary for it to provide special vehicular equipment such as a tank vehicle or a lowboy unit, and the inherent nature of the service authorized confines its activities to a certain industry. Within the terms of its certificate, however, it is under a duty to serve all members of the public desiring its service.

Thousands of certificates authorizing special types of operations have been issued; and U.S.A.C.'s operation is a classic example of a common carrier "specializing" in service for a particular industry. Its services are legitimately within the scope of a common carrier's function if such services are held out to all who can use them. Fundamentally, each service performed by a common carrier must, of necessity, be "specialized" to a certain degree to meet the particular needs attending the movement of any commodity. What could be more specialized than the services furnished by the so-called oilfield carriers to the oil and gas industries? The nature and variety of the services of these common carriers, both with respect to the commodities handled and the special equipment and other facilities furnished, is detailed in *Mercer Extension—Oil Field Commodities,* 74 M.C.C. 459; and many similar situations could be cited. The conclusion, therefore, is inescapable that a motor common carrier may, in accordance with the statutory definition, physically provide all transportation services within the scope of its authority, consistent with its duty and obligations as a common carrier, and with any degree of specialization necessarily inherent to the traffic transported.

On the other hand, specialization has always been a factor considered by us when it is necessary to determine whether an operation is common or contract carriage, as, for example, in *Craig Contract Carrier Application,* 31 M.C.C. 705, 712, where it was stated:

> We recognize, of course, that even specialization in physical operation does not necessarily negative a common-carriage status where, for example, such physically specialized services are affirmatively held out to all shippers in that particular class of the public having a need therefor. But, on the other hand, we are con-

> vinced that the lack of one or the other forms of specialization above indicated conclusively negatives contract carriage as contemplated by section 203(a)(15) of the act.

In commenting on this report, the Supreme Court in *United States* v. *Contract Steel Carriers, Inc.*, 350 U.S. 409, 411, said: "A requirement of specialization is supported by respectable legislative history."

As seen, prior to these amendments, even where a highly specialized service was proposed, the existence of common-carrier service, if any, and whether or not that service would meet the reasonable transportation needs of those supporting the application, was always considered in our determination of applications for contract-carrier authority. The ability of common carriers to compete with contract carriers for the same traffic has been recognized from the inception of motor carrier regulation in 1935, and in each contract-carrier application opposed by a common carrier the burden was upon the applicant to establish that existing common carriers could not satisfactorily meet the reasonable transportation requirements of the shipper or shippers supporting the application. Early, in *C. & D. Oil Co. Contract Carrier Application*, 1 M.C.C. 329, 332, an application for contract-carrier authority, it was said:

> We think that, in order to foster sound economic conditions in the motor-carrier industry, existing motor carriers should normally be accorded the right to transport all traffic which they can handle adequately, efficiently, and economically in the territory served by them, as against any person now seeking to enter the field of motor-carrier transportation in circumstances such as are here disclosed.

For many years this principle has been followed in disposing of applications for contract-carrier permits

opposed by common carriers, the decisive factor being whether the available common-carrier service was reasonably adequate to meet the transportation needs involved.[3]

The import of applicant's position here is that under the 1957 legislation this long-established principle has been abandoned, and that this legislation was intended not only to delineate the distinction between common and contract carriage, but was also intended so to separate these two types of motor transportation as to virtually eliminate the ability of a common carrier to compete with a contract carrier for the same traffic, and thus to render the fact that motor common carrier service available is of little or no weight in the disposition of contract-carrier applications. In our view such a position is untenable.

As of August 22, 1957, the definition of a contract carrier by motor vehicle in section 203(a)(15) of the act was amended to read as follows:

> The term "contract carrier by motor vehicle" means any person which engages in the transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the

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[3] *Arrow Transp. Contract Carrier Application*, 73 M.C.C. 261; *Refiners Transport, Inc., Extension—Missouri*, 71 M.C.C. 272; *Overland Freight Lines, Inc., Extension—Kentucky*, 69 M.C.C. 143; *Guex Extension—Chicago Commercial Zone*, 67 M.C.C. 224; *Kilmer Transp. Co. Extension—Uniontown*, 53 M.C.C. 561; and *Hibbard Extension of Operations—Lime*, 47 M.C.C. 311.

> furnishing of transportation services designed to meet the distinct need of each individual customer.

At the same time section 209(b) was also amended. As pertinent, it provides that:

> In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shippers and the changing character of that shipper's requirements.

Both amendments were enacted as a result of certain proposals made by us to Congress in our 70th annual report, wherein we noted at page 163 that amendments were needed to "preserve" the distinction between contract and common carriers and to insure that all contractual arrangements of contract carriers would cover only individual and specialized service. As we have indicated, these proposals were prompted by the fact that under the prior law, as construed by the courts, contract carriers were free to add contracts within the scope of their permits. Before the decision in *United States* v. *Contract Steel Carriers, Inc., supra,* there were instances in which some contract carriers expanded their activities to such an extent that they were serving numerous shippers and were otherwise conducting their operation in a manner which raised serious doubts as to whether they were operating lawfully as contract carriers. Proceedings were instituted against certain of these carriers, and among the factors considered in deter-

mining whether they were operating as bona fide contract carriers was the number of transportation contracts into which they had entered. *Transportation Activities of Fischbach Trucking Co.*, 61 M.C.C. 185; *Transportation Activities of Midwest Transfer Co.*, 49 M.C.C. 383, 51 M.C.C. 355, 52 M.C.C. 33, and 52 M.C.C. 261. *United States* v. *Contract Steel Carriers, Inc., supra,* in effect, served to preclude consideration by us of the number of the shippers served as one of the criteria for determining such proceeding, and opened the door to contract carriers to negotiate an unlimited number of transportation contracts. Thus too often the distinction between contract- and common-carrier service vanished, since contract carriers, owing to their ability to negotiate numerous additional contracts, were in effect offering their services to the public generally. It was to preserve or reinstate the distinction between common and contract carriage, both with respect to specialization and the number of shippers to be served that the 1957 amendments were enacted.

As originally proposed, section 203(a)(15) would have defined a contract carrier as one which, among other things, furnishes transportation service "not provided by common carriers" and section 209(b) would have required that this Commission, before granting contract-carrier authority, make the findings, among other things, that "existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." While Congress was still considering this proposal, we concurred in the deletion of the above-quoted language for the reason that it was not considered necessary to carry out the purpose of the amendments. This deletion should not be construed as an expression of an intention on the part of Congress to eliminate

the standing of common carriers to oppose contract-carrier applications, but rather its purpose was to insure that too heavy a burden of proof was not imposed upon contract-carrier applicants. Thus, in explaining to the Senate Subcommittee on Surface Transportation the proposed modifications in the bill to revise the definition of the term "contract carrier by motor vehicle," we noted:

> These words are not necessary to carry out the purpose of the bill and the deletion thereof is consistent with our previously expressed position, and with the standard already provided in the bill respecting special and individualized service.[4]

And former Chairman Clarke who, in testifying before the same Senate subcommittee, stated:

> I wish to state at this point, that because of the very difficult burden of proof that would be imposed on applicants by the last mentioned provision (that is, that additional permits may be issued only upon a showing that existing common carriers are unable or unwilling to render the required type of service), the Commission, upon further consideration, has voted to withdraw its recommendation to amend section 209(b) in this respect.[5] [Matter in parenthesis added.]

We think it clear that the purpose of Congress in enacting the 1957 amendments was to sharpen the distinction between common and contract carriage by imposing upon contract carriers specific restrictions as to the number of the shippers which they may serve and the type of service which they may perform;

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[4] S. Rep. No. 703, 85th Cong., 1st sess. 5 (1957).

[5] Hearing before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce 85th Cong., 1st sess., at 22 (1957).

that Congress did not intend or even contemplate the abandonment of our long continued practice of considering the adequacy of existing common- as well as contract-carrier service in determining whether a need has been established for a proposed contract-carrier operation; and that there is no indication in the language of these amendments or in the legislative history surrounding their enactment that Congress intended to place any limitation upon the type of service which a common carrier may lawfully perform. Plainly there was no intention to enhance the economic position of the contract carrier at the expense of the common carrier. We conclude therefore, that a common carrier may perform, as it could prior to these amendments, a variety of specialized services, so long as it operates within the scope of its certificates and holds itself out to perform these same services for all members of the particular segment of the shipping public which has a need for them and which it is authorized to serve. And certainly there is nothing in the legislative history or elsewhere to support the proposition that, under the amendments, an applicant, once it establishes that its proposed operation falls within the definition of contract carriage, is entitled automatically to a grant of authority consistent with the desires of the supporting shippers, regardless of the availability of common-carrier service, or even contract-carrier service. Such a construction would negative the history of the new legislation and run contrary to the provisions of the national transportation policy which must be considered in the disposition of all applications for operating authority.

Section 209(b) as it now reads sets out certain criteria which we must consider in determining

whether a grant of authority will be consistent with the public interest and the national transportation policy. Most of these points may be best discussed in relation to the peculiar facts of the instant applications, but it should be noted here that one of the factors to be considered is the effect which a grant of authority would have upon the services of protesting carriers. The statute does not say that the effect upon protesting contract carriers only is to be considered, and there is no reason to assume that Congress intended us to ignore the available service offered by motor common carriers or rail carriers or the effect which a grant of authority would have upon them. The question presented, then, is how we are to determine whether a grant of authority will adversely affect the service of a protestant. It might be argued that where, as here, a protestant is not now enjoying the involved traffic, it cannot be adversely affected by a grant of authority. However, we believe that our past holdings that existing carriers are entitled to transport all the traffic which they can economically and efficiently handle before additional authority is granted are equally valid today as they were prior to the 1957 amendments to the act. There is, in effect, a presumption that the services of existing carriers will be adversely affected by a loss of "potential" traffic, even if they may not have handled it before. Any doubt that we might have that existing carriers generally should be afforded an opportunity to handle available traffic before a new service is authorized is disspelled by the specific wording of section 209(b), and a number of applications for contract-carrier authority have, in fact, been denied since the passage of the 1957 amendment in spite of the

fact that the only opposition was that of common carriers.[6]

It should also be pointed out here that there is no indication that Congress intended the criteria contained in section 209(b) to be exclusive or to preclude our consideration of other factors in determining contract-carrier applications. It has consistently been held that all sections of the act must be interpreted and administered in accordance with the national transportation policy which provides, as pertinent:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *

*In Schaffer Transp. Co.* v. *United States,* 355 U.S. 83, 88, hereinafter sometimes referred as the *Schaffer* case, the Supreme Court said: "[T]his Court has made it clear that this policy is the yardstick by which the correctness of the Commission's actions will be measured." The congressional mandate could not

[6] *Wagner Contract Carrier Application*, 77 M.C.C. 777; *Coastal Motor Lines Contract Carrier Application*, 77 M.C.C. 510; *Woodward Extension—Woodblocks*, 76 M.C.C. 377; and *Carolina Haulers, Inc., Contract Carrier Application*, 76 M.C.C. 254.

be carried out if we were to close our eyes to any matter which might affect the good of the national transportation system as a whole. Surely sound economic conditions in the transportation industry could not be maintained if common carriers, who have the obligation of providing service to the public at large within the scope of their authorities, were faced with a situation in which available traffic could be, as it were, withdrawn from general circulation and given to contract carriers without these common carriers being given the opportunity to make an effective showing of their willingness and ability to provide needed service.

DETERMINATION OF THE INSTANT APPLICATIONS

We think that the application of the foregoing principles to the instant applications justifies some repetition of matters previously discussed generally. In deciding any application for contract-carrier authority we must consider whether the operation proposed and the overall operations of the applicant are those of a contract carrier. As noted, under the amended definition of a contract carrier (section 203(a)(15)), a person, in order to be a contract carrier (1) must be a carrier for hire, but not a common carrier; and (2) must serve, under continuing contracts, one or a limited number of persons, and either (*a*) assign vehicles for a continuing period of time to the exclusive use of each person served or (*b*) furnish services designed to meet the distinct need of each individual customer.

Applicant presently has contracts with nine aircraft manufacturers, and all of its pending applications, including the two under consideration here, are supported by the shippers with which it already

has contracts. Applicant does not hold out its service to the public generally, but offers to serve only these nine shippers. We conclude, therefore that it is a for-hire carrier, but not a common carrier as defined in the act, and serves a limited number of persons under continuing contracts. In addition, its usual practice is to assign vehicles to the exclusive use of individual customers for continuing periods of time, and it would follow this practice wth respect to the service proposed here should the instant applications be granted. In view of the unusual design and fragile nature of the subject articles, the security considerations, and the necessity for coordinating the delivery of the considered items with the shippers' production schedules, it is obvious that applicant proposes to render a specialized service. Taking all these matters into consideration, we think it clear that the operations proposed come within the new definition of contract carriage.

Also, as previously noted in determining whether a grant of contract-carrier authority will be consistent with the public interest and the national transportation policy, we are required by section 209(b) to give consideration to the following factors: (1) The number of shippers to be served by applicant, (2) the nature of the service proposed, (3) the effect of a grant of authority upon the services of protesting carriers, (4) the effect of a denial on applicant and its supporting shipper, and (5) the changing character of the shipper's requirements.

The first factor, the number of shippers to be served, is, as we understand it, to be considered on the basis of applicant's present and proposed situation in relation to the question whether applicant intends to serve "one or a limited number of shippers," and

is thus a bona fide contract carrier as defined in section 203(a)(15) of the act. As seen by the foregoing, applicant meets this particular requirement.

The next factor, the nature of the proposed service, is one which must be considered particularly carefully in any case such as this where a contract-carrier application is opposed by a common carrier. We must determine whether the service proposed and shown to be needed by the supporting shipper is one which might be performed by either a common or contract carrier, or by one such class of carriers only. It should be noted here that the requirements of many shippers could quite satisfactorily be met by either a common or a contract carrier. If the carrier serves a limited number of shippers under continuing contracts and assigns vehicles to the exclusive use of each, it meets the statutory definition of a contract carrier, even though the equipment supplied or the service which it renders may be indistinguishable from that offered by common carriers. We have already determined that the service applicant proposes meets this definition.

The requirement of section 209(b) that we consider the effect which a grant of authority would have upon the services of protesting carriers has, we believe, been adequately discussed. It is sufficient at this point to say that, in view of our finding herein that U.S.A.C. is in a position to provide any service that is needed, we conclude that a grant of authority to applicant would have an adverse effect upon that protestant. It may be worthy of repeating, however, that in the economic regulation of motor transportation through grants of operating authority, the principle that existing carriers should be accorded the opportunity to transport available traffic that they can handle adequately, efficiently, and economically in the territories

they serve before a competitive service is authorized is sound doctrine, in the public interest, and in furtherance of the national transportation policy, whether the application is one for common- or contract-carrier authority.

Section 209(b) next requires us to consider the effect of a denial on applicant and its supporting shipper. With respect to the effect of a denial on applicant, we note that although applicant has incurred substantial expense in fitting certain of its trailers to the shippers' specifications, this equipment is of the type which is suitable generally for transporting aircraft parts and may, with modifications, be used to handle other traffic. In any event, both applicant and its supporting shippers knew or should have known that U.S.A.C held the requisite authority to provide the proposed services, and therefore their agreement and the expenditures made by applicant prior to the filing of the application cannot be allowed to be controlling, of themselves, in resolving the issues presented here. Any other construction of such pre-application action by either a shipper or a prospective applicant would open the door to numerous abuses and thwart the basic purpose of our regulation and the national transportation policy.

Whether the shippers would be adversely affected by a denial must depend upon a determination of whether existing service is adequate to meet their transportation requirements. U.S.A.C., by confining its activities almost entirely to serving the aircraft industry, is presently furnishing a highly specialized service to numerous other aircraft manufacturers whose requirements are similar, if not the same, as those of the supporting shippers. In fact, its ability to obtain business depends on its ability to satisfy the needs of the shippers having transportation require-

ments similar to those of these supporting shippers, and it is dependent upon the very kind of traffic that is here considered for the continuance of its operations. In view of our determination that a common carrier may furnish a specialized service provided it offer such service to the public generally, there is no question but that U.S.A.C. holds the operating authority necessary to furnish the needed service. Its drivers have security clearance; it has equipment suitable for transporting aircraft assemblies, parts, and equipment; and, if the supporting shippers will furnish it with specifications for the fixtures necessary to handle their particular traffic, it will modify as many pieces of its equipment as is necessary to provide adequate service. Furthermore, it is willing to dedicate certain of its trailers to the exclusive use of each of the shippers. In this connection, it is noted that its tariff contains a provision whereby it may exercise control over the type of equipment to be used in a particular movement. This is a provision frequently found in tariffs published by common carriers; however, in view of this protestant's expressed willingness to modify its equipment to fit the shippers' specifications and to assign such equipment to the exclusive use of each of the shippers, there does not appear to be anything in its tariff which would prevent it from rendering a satisfactory service.

Considering the highly specialized service in transporting traffic similar to that here considered which U.S.A.C. is presently rendering to numerous manufacturers and suppliers in the aircraft industry, its ability and willingness to provide the service which the supporting shippers require, and the fact that, with respect to the instant traffic, neither shipper has attempted to avail itself of U.S.A.C.'s services, we cannot find that existing service has been shown to

be inadequate. Plainly, there is no warrant on these records for a finding that the supporting shippers require a distinct type of service that cannot be provided by U.S.A.C. To the contrary, the very business of U.S.A.C. is the transportation of the type of traffic involved.

The final matter which section 209(b) directs us to consider in determining contract-carrier applications is the effect which a denial would have upon the changing character of the shipper's requirements. What this criterion refers to, we believe, are situations in which a shipper presently being provided with a complete transportation service by a contract carrier experiences a change in such things as the marketing areas which it serves, the commodities which it handles, or the location of its plants, which require that its carrier acquire additional operating authority if it is to continue to render a complete service. There is no indication that such a situation exists here with respect to either of the two supporting shippers.

At this point we wish to make clear, as hereinbefore indicated, that the matters discussed are not the only ones which should or can be considered in the determination of contract-carrier applications. While they embrace the important considerations of the need for the proposed service and the adequacy of existing service, they are not all inclusive, and other factors affecting the public interest and the national transportation policy may, and in some cases must, be considered. Where, for example, the issuance of a permit would result in objectionable dual operations by applicant as a common and contract carrier, this fact must be considered. Likewise, the relationship of the supporting shipper to the applicant may be an opponent's important objection to the proposed opera-

tion and would have to be dealt with from the standpoint of the public interest and our duty under the national transportation policy.

Although applicant argues that denial will give U.S.A.C. a monopoly with respect to the traffic, it appears that there is only sufficient traffic to support one carrier's operation and that U.S.A.C. should be given an opportunity to transport it before a new carrier is permitted to enter the field. In the circumstances, we consider its argument as to monopoly to be without merit.

In our opinion nothing herein is inconsistent with the results obtained in the *Bass* case or in *Schaffer Transp. Co.* v. *United States, supra,* cited by applicant in its pleadings. Rather than support for applicant's position the *Bass* case is in accord with the findings made here. There the court affirmed this Commission's denial of an application for contract-carrier authority to perform a charter passenger service in which our action was based solely on the ground that existing common carriers could meet the needs of the public for charter service. Although the court stated, *inter alia,* that there is a duty to determine "whether the existing contract service is adequate" in a proceeding in which an applicant seeks authority to perform a "contract service," the court apparently was referring to the peculiar characteristics of a charter bus service where a group collectively contracts for the exclusive use of certain equipment. In our opinion, the court did not imply, as applicant suggests, that where contract-carrier authority is sought this Commission must grant a permit where there is no contract carrier available to perform the service regardless of the existence of adequate common-carrier service. We are of the further opinion

that even though the decision of division 1 in the Bass application was reached prior to the 1957 amendments to the act, the conclusion reached by the court that available common-carrier service must be given consideration in an application for contract-carrier authority continues to be valid.

In the *Schaffer* case the Supreme Court held that, when deciding an application for motor-carrier operating authority, we must consider, among other things, the inherent advantages of the several modes of transportation. Contract and common carriage by motor vehicle are not separate modes of transportation but rather are subdivisions of the same mode, that is, motor transportation. Consequently where, as here, it appears that a motor common carrier is able to furnish a service substantially similar to that proposed by a motor contract carrier applicant, the *Schaffer* case does not negate our long-continued policy of giving consideration to the effect on existing common carriers before approval is given to a grant of additional motor-carrier authority, whether it be contract or common; nor do we believe it requires any different result from that reached here.

Therefore, we conclude in each proceeding, (1) that the character of the shippers' transportation requirements is not such as to preclude their performance by a common carrier, (2) that U.S.A.C. is fully able to meet the shippers' needs and would be adversely affected by a grant of either application, (3) that in view of the adequacy of existing common-carrier service the supporting shippers would not be materially affected by a denial of the applications, (4) that the potential loss of traffic to U.S.A.C. outweighs any detriment to applicant, (5) that to authorize the proposed operations will not be consistent with the public

interest and the national transportation policy, and (6) that under the circumstances both applications should be denied.

FINDINGS

On reconsideration, in Nos. MC–11185 (Sub-No. 100) and MC–11185 (Sub-No. 102), we find that applicant has failed to establish that the proposed operations will be consistent with the public interest and the national transportation policy; and that each application should be denied.

An appropriate order will be entered.

COMMISSIONER FREAS concurs in the result.

COMMISSIONER WALRATH, concurring:

While I concur in the result reached by the majority, I would have preferred for the report to cover more fully the matter of services that a contract carrier must, under the amendments, now provide.

COMMISSIONER WEBB, concurring:

Weighing the five tests prescribed by section 209(b) of the act for determining whether a permit should be issued, I agree with the result reached by the majority. It seems to me, however, that the report prescribes a sixth test not authorized by the Congress and, in fact, a test considered by the Congress and deliberately rejected. The report seems to me to convey the impression that if an applicant for contract-carrier authority flunks this sixth test, the application must be denied regardless of the extent to which the five enumerated tests of section 209(b) have been satisfied.

What I call the sixth test prescribed by the report is the conclusion that in each contract-carrier application the burden is on the applicant to show that protesting common carriers are unwilling or unable to meet the shipper's reasonable transportation requirements. The conclusion, in my opinion, is not

supported by the language of Public Law 85–163 or by the pertinent legislative history.

When the bill (S. 1384) which became Public Law 85–163 was introduced, it amended section 203(a)(15) of the act so as to define a contract carrier as one who conducts its business other than as a common carrier and—

> under continuing contracts with one person or a limited number of persons for the furnishing of transportation services of a special and individual nature required by the customer *and not provided by common carriers.*

The Senate Committee on Interstate and Foreign Commerce deleted the language italicized above. In addition, the Committee eliminated from the bill the requirement of a showing under section 209(b) "that existing common carriers are unwilling or unable to provide the type of service for which a need has been shown." In place of the language last quoted, the Committee directed the Commission to consider "the effect which granting the permit would have upon the services of the protesting carriers." As thus amended, the bill was enacted into law.

Obviously, there is virtually no difference between the test formulated in the report of the Commission and the test which would have been prescribed by the language deleted from the bill. I do not see how it is possible to contend that the stricken language added nothing to the bill. Nor do I agree that the Senate Committee deleted that language solely because it required an impossible burden of proof. If the Congress had intended to sanction the test employed in the report, it would no doubt have required in section 203(a)(15) that the proposed service must be shown to be "not provided by *protestant* common carriers" and in section 209(b) "that *protestant* com-

mon carriers are unwilling or unable to provide the type of service for which a need has been shown."

Contract carriers opposed the bill as originally introduced on the ground that to require proof as to the nonexistence of adequate common-carrier service would prevent extension of, if not destroy, contract-carrier service. The Department of Commerce agreed. The Congress agreed. The need to employ a public convenience and necessity standard in section 209 proceedings disappeared when, under the new law, permits ceased to be unrestricted licenses for hunting traffic. As I see it, the report attempts to write into sections 203(a)(15) and 209(b) language deliberately stricken by the Congress. The report converts compromise legislation, generally satisfactory to all concerned, into an unearned legislative victory for common carriers and a humiliating legislative defeat for contract carriers.

COMMISSIONER MCPHERSON, dissenting:

On reconsideration I now conclude that the applications should be granted.

The shippers require a service in which vehicles are assigned to them for their exclusive use for continuing periods of time. The protestants hold authority which is broad enough. However, the question is not restricted merely to the holding of appropriate authority, but also embraces the service which the shippers require. The specialized service required by these shippers is within the definition of contract carriage.

In weighing the effect of a grant or denial would have upon the services of the protestant, and the applicant, and/or the shipper, I would decide in favor of a grant in these particular cases.

COMMISSIONERS MITCHELL, ARPAIA, and WINCHELL did not participate.

## APPENDIX E

### STATUTES INVOLVED

The National Transportation Policy, 54 Stat. 899, 49 U.S.C., notes preceding Sections 1, 301, 901, and 1001, enacted September 18, 1940, provides as follows:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. 303(a)(15), as amended on August

22, 1957, 71 Stat. 411, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 203. (a) As used in this part—

* * * * *

(15) The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b), as amended on August 22, 1957, 71 State. 411–12, Public Law 85–163, 85th Cong., S. 1384, provides as follows:

Sec. 209

* * * * *

(b) Applications for such permits shall be made to the Commission in writing, be verified under oath, and shall be in such form and contain such information and be accompanied by proof of service upon such interested parties as the Commission may, by regulations, require. Subject to section 210, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by

motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit will be consistent with the public interest and the national transportation policy declared in this Act; otherwise such application shall be denied. In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit would have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. The Commission shall specify in the permit the business of the contract carrier covered thereby and the scope thereof, and it shall attach to it at the time of issuance, and from time to time thereafter, such reasonable terms, conditions, and limitations, consistent with the character of the holder as a contract carrier, including terms, conditions and limitations respecting the person or persons and the number or class thereof for which the contract carrier may perform transportation service, as may be necessary to assure that the business is that of a contract carrier and within the scope of the permit, and to carry out with respect to the operation of such carrier the requirements established by the Commission under section 204(a)(2) and (6): *Provided,* That within the scope of the permit and any terms, conditions, or limitations attached thereto, the carrier shall have the right to substitute or add to its equipment and facilities as the development of its business may require: *Provided further,* That

no terms, conditions or limitations shall be imposed in any permit issued on or before the effective date of this proviso which shall restrict the right of the carrier to substitute similar contracts within the scope of such permit; or to add contracts within the scope of such permit unless upon investigation on its own motion or petition of an interested carrier the Commission shall find that the scope of the additional operations of the carrier is not confined to those of a contract carrier as defined in section 203(a)(15), as in force on and after the effective date of this proviso.

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